

STATE OF MICHIGAN
IN THE SUPREME COURT

OSHTEMO, CHARTER TOWNSHIP OF,

Appellant,

Supreme Court Case No. 150695

v

Court of Appeals Case No. 317893

MPSC Case No. U-17041

MICHIGAN PUBLIC SERVICE
COMMISSION and MICHIGAN
ELECTRIC TRANSMISSION
COMPANY, LLC

Appellees.

**MICHIGAN ELECTRIC TRANSMISSION COMPANY, LLC'S RESPONSE TO
OSHTEMO CHARTER TOWNSHIP'S APPLICATION FOR LEAVE TO APPEAL**

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COUNTER-STATEMENT OF QUESTION PRESENTED

- I. **SHOULD THIS COURT GRANT LEAVE TO APPEAL WHERE THE COURT OF APPEALS APPLIED PUBLIC ACT 30 OF 1995'S PLAIN LANGUAGE, THE MICHIGAN CONSTITUTION'S PLAIN LANGUAGE, AND LONG-STANDING PRECEDENT INTERPRETING THAT LANGUAGE TO AFFIRM A MICHIGAN PUBLIC SERVICE COMMISSION ORDER THAT WAS BASED ON COMPETENT, MATERIAL AND SUBSTANTIAL EVIDENCE ON THE WHOLE RECORD?**

Appellee METC answers "no."

Appellee Michigan Public Service Commission presumably answers "no."

Appellant Oshtemo Township presumably answers "yes."

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has made clear that a local government cannot regulate public utilities—even when those utilities are in that local government’s right-of-way—in a manner inconsistent with state law, especially where such regulation would intrude upon important statewide issues:

Consistent with our longstanding precedent, we hold that a municipality’s exercise of ‘reasonable control’ over its streets cannot impinge on matters of statewide concern nor can a municipality regulate in a manner inconsistent with state law.

City of Taylor v Detroit Edison Co, 475 Mich 109, 112; 715 NW2d 28 (2006). These principles were recognized and applied by the Court of Appeals in this case, yet are completely ignored by Oshtemo Township’s (the “Township”) Application for Leave to Appeal.

The Electric Transmission Line Certification Act, PA 30 of 1995, MCL 460.561 *et seq.* (“Act 30”) establishes a centralized process for state-level review and approval of the location and construction of certain electric transmission lines, and was enacted by the Legislature to **avoid** unreasonable local interference with electric transmission projects.¹ This is because electric transmission lines address issues of statewide—not local—concern. In fact, the Legislature took the extraordinary step of declaring that electric transmission is an “essential service” to the state. MCL 460.563. This case is a perfect illustration of electric transmission’s statewide significance, because the

¹ Indeed, the preamble to Act 30 provides:

AN ACT to regulate the location and construction of certain electric transmission lines; to prescribe powers and duties of the Michigan public service commission **and to give precedence to its determination in certain circumstances; and to prescribe the powers and duties of certain local units of government and officials of those local units of government.** (Emphasis added).

uncontested record evidence demonstrated that, while the transmission line at issue is only approximately seven miles long and primarily located in only one township, the line's effects are far-reaching. Without the line, the potential for serious reliability issues—including brownouts and blackouts in the Kalamazoo and Battle Creek areas—could result. (3 Tr. 80).² The regional impact of such brownouts or blackouts, and the public interest in protecting against such catastrophes is obvious, and must be avoided.³

Because of electric transmission projects' state-wide importance, Act 30 provides that once the Michigan Public Service Commission (the "MPSC" or the "Commission") issues an order granting a certificate of public convenience and necessity ("Certificate") under Act 30, that Certificate takes precedence over all conflicting local laws and ordinances regulating the location and construction of the approved transmission line. In other words, Act 30 eradicated a patchwork of local ordinances that would have complicated and prevented transmission line construction and instead created a single, centralized system allowing transmission owners to seek Commission approval for the siting and construction of transmission lines.

² Citations to "Tr." Are to the official transcript from the docket at the Michigan Public Service Commission.

³ By way of example, the impact of regional and/or widespread blackouts can be massive. One extreme example of this occurred on August 14, 2003, when large portions of the Midwest and Northeast United States and Ontario, Canada, experienced an electric power blackout. The outage affected an area with an estimated 50 million people and 61,800 megawatts (MW) of electric load in the states of Ohio, Michigan, Pennsylvania, New York, Vermont, Massachusetts, Connecticut, New Jersey and the Canadian province of Ontario. Estimates of total costs in the United States range between \$4 billion and \$10 billion (U.S. dollars). See <https://www.ferc.gov/industries/electric/indus-act/reliability/blackout/ch1-3.pdf>

Contrary to the Township's claims in its Application for Leave, neither the MPSC nor the Court of Appeals "struck down" the Township's Utility Control Ordinance (the "Ordinance" or the "Township Ordinance"). Instead, in conformance with the precise standards laid out by Act 30, the Commission issued an order on July 29, 2013 granting METC a Certificate under Act 30 and authorizing METC to construct an overhead transmission line. In so doing, the MPSC properly concluded that the Township's Ordinance, which directly regulates the location and construction of transmission lines and required that METC construct portions of its transmission line underground, conflicted with the Certificate. Where such a conflict is present, Act 30's plain and unambiguous language provides that the Certificate takes precedence over the Ordinance. After a thorough analysis of the record evidence, Act 30's plain language, the Michigan Constitution, and binding precedent, the Court of Appeals properly affirmed the MPSC in an opinion issued November 18, 2014 (the "Opinion").

The Township's arguments are meritless. The Court of Appeal's affirmance of the MPSC does not create "manifest injustice." Act 30 is not unconstitutional, the Court of Appeals did not ignore Act 30's plain language, and the Court of Appeals clearly analyzed and considered the conflict between the Certificate and the Ordinance. The Opinion was consistent with long standing precedent, the plain language of statutes at issue, and the Michigan Constitution. The Township has failed to demonstrate any reason for this Court to grant leave and reverse the Court of Appeals' Opinion. Consequently, this Court should deny the Township's Application for Leave.

COUNTER STATEMENT OF FACTS AND PROCEDURAL HISTORY

Without any citation to the record, including failing to even reference the Ordinance, the Township's Application for Leave to Appeal provides an abbreviated

“Statement of Facts” that leaves out a tremendous amount of relevant information. A proper factual context, however, is necessary for this Court to fully appreciate the Township’s request to grant leave and reverse the Opinion. That context necessarily begins with a brief discussion of Act 30 and the MPSC’s issuance of the Certificate.

A. A Brief Description of the Electric Grid.

Before discussion of this case’s factual background, it may be helpful to place the subject matter at issue—electric transmission lines—into context. The electrical system has three separate and distinct functions. The first function, electric generation, is the process of producing electricity through the transformation of other forms of energy. A generating plant, such as a wind farm, a coal plant, or a nuclear power plant, is the facility where the equipment for converting energy into electric energy is located. The second function, transmission, is “[t]he act or process of transporting electric energy in bulk.” *Electric Power Industry Glossary*, available online at www.energycentral.com. Usually, transmission lines operate at a potential of 69 kilovolts (i.e. 69,000 volts) or more.⁴ Act 30 defines a “transmission line” as “all structures, equipment, and real property necessary to transfer electricity at system bulk supply voltage of 100 kilovolts [i.e. 100,000 volts] or more.” MCL 460.562(k). Transmission lines, in other words, carry high voltage electricity from generating plants to the third system—distribution. Electric distribution consists of “[t]he system of wires, switches, and transformers that serve neighborhoods and businesses, typically lower than 69,000 volts. A distribution system reduces or downgrades power from high-voltage transmission lines to a level that can be used in homes or businesses.” *Electric Glossary, supra*. In summary, generation

⁴ By comparison, a standard electric socket is typically 120 volts.

makes the electricity, transmission transports the electricity, and distribution takes the electricity into customers' homes and businesses. The following diagram is a simple representation of this system:

In the above representation, 1 represents generation, 2 and 3 represent transmission (like the lines and substation at issue in this case), and 4, 5, and 6 represent distribution (such as the lines Detroit Edison, Consumers Energy, or Lansing Board of Water & Light use to bring electricity directly to homes and businesses). This case involves the location and construction of the facilities represented by 2 and 3 above—all in order to maintain electric reliability in the Kalamazoo area.

B. Act 30 Regulates the Location and Construction of Certain Electric Transmission Lines.

This case concerns the interpretation and application of Act 30—a law which regulates the “location and construction of certain electric transmission lines.” Preamble, Act 30. Recognizing the importance of electric transmission, Act 30 deems electric transmission an “essential service,” and provides that Act 30 “shall control in any conflict between this act and any other law of this state.” MCL 460.563(1), (2).

Act 30 applies to “major transmission lines,” and, in certain circumstances, “transmission lines.” At issue in this case is a “transmission line.” As is suggested by their names, the primary difference between a transmission line and a “major transmission line” is the length and voltage of the line. As previously noted, a “transmission line” under Act 30 is “all structures, equipment, and real property necessary to transfer electricity at system bulk supply voltage of 100 kilovolts or more.” MCL 460.562(k). A “major transmission line, on the other hand, “is a line of 5 miles or more in length wholly or partially owned by an electric utility, affiliated transmission company, or independent transmission company through which electricity is transferred at a system bulk supply voltage of 345 kilovolts or more.” MCL 460.562(g). While Act 30 requires utilities to seek Commission approval before constructing a “major transmission line,” seeking a Certificate for a “transmission line” is discretionary with the utility (in this case, METC). MCL 460.565; MCL 460.569. Because the transmission line at issue in this case is not a “major transmission line,” METC voluntarily sought a Certificate in this instance.

Act 30 requires an applicant seeking a Certificate to file an application with the Commission covering specific information:

An application for a certificate shall contain all of the following:

- (a) The planned date for beginning construction.
- (b) A detailed description of the proposed major transmission line, its route, and its expected configuration and use.
- (c) A description and evaluation of 1 or more alternate major transmission line routes and a statement of why the proposed route was selected.

(d) **If a zoning ordinance prohibits or regulates the location or development of any portion of a proposed route, a description of the location and manner in which that zoning ordinance prohibits or regulates the location or construction of the proposed route.**

(e) The estimated overall cost of the proposed major transmission line.

(f) Information supporting the need for the proposed major transmission line, including identification of known future wholesale users of the proposed major transmission line.

(g) Estimated quantifiable and nonquantifiable public benefits of the proposed major transmission line.

(h) Estimated private benefits of the proposed major transmission line to the applicant or any legal entity that is affiliated with the applicant.

(i) Information addressing potential effects of the proposed major transmission line on public health and safety.

(j) A summary of all comments received at each public meeting and the applicant's response to those comments.

(k) Information indicating that the proposed major transmission line will comply with all applicable state and federal environmental standards, laws, and rules.

(l) Other information reasonably required by the commission pursuant to rule.⁵

MCL 460.567(2) (emphasis added). Upon filing, an applicant must provide an MPSC-approved notice of the application to every affected municipality and landowner on whose property a portion of the line will be constructed, as well as publishing in a newspaper of general circulation in the affected area. MCL 460.568(1).

In considering an application under Act 30, the Commission must conduct a contested case proceeding in which any affected landowner and municipality may

⁵ To date, the Commission has not promulgated administrative rules applicable to Act 30.

intervene as of right. MCL 460.568(2). Section 8 of Act 30 establishes the parameters for the Commission's consideration in granting or denying an application for a Certificate after a contested case hearing:

- (5) The commission shall grant the application and issue a certificate if it determines all of the following:
 - (a) The quantifiable and nonquantifiable public benefits of the proposed major transmission line justify its construction.
 - (b) The proposed or alternative route is feasible and reasonable.
 - (c) The proposed major transmission line does not present an unreasonable threat to public health or safety.
 - (d) The application has accepted the conditions contained in a conditional grant.

MCL 460.568(5). If granted, a Certificate issued pursuant to Act 30 takes precedence over conflicting local ordinances, laws, rules, regulations, policies or practices that prohibit or regulate the location or construction of an approved transmission line. MCL 460.570(1). A Certificate is also conclusive and binding as to an approved transmission line's public convenience and necessity. MCL 460.570(3).

C. After Determining that the Proposed Transmission Line Was Necessary for Electric Reliability, METC Took Several Steps Before Seeking MPSC Approval to Construct the Line. Ultimately, the Township's Actions Forced METC to Seek Act 30 Approval.

The above framework provides the proper backdrop for consideration of the facts in this case. It is important to recognize that preparing for and filing an Act 30 application is not an easy undertaking. METC undertook significant work before it filed its Act 30 application with the MPSC, including the investment of substantial time and resources over several years to set the foundation for its application:

- METC conducted planning studies and identified a reliability need;
- METC developed and evaluated numerous potential solutions to the identified reliability need;
- METC submitted the Proposed Transmission Line and nine other alternatives to the Midcontinent Independent Transmission System Operator, Inc. ("MISO") for evaluation in the 2009 MISO Transmission Expansion Plan ("MTEP");
- The proposed transmission line was evaluated by MISO and MISO stakeholders—including Commission Staff, METC, Consumers Energy, and others—through the MTEP process and approved in December 2009; and,
- METC began the route selection process and undertook significant outreach efforts with the local community.

Each of these steps, which were extensively detailed in the record, are briefly discussed in more detail below.

1. METC identified a reliability need and obtained federal approval for the Proposed Transmission Line through the FERC Order 890 open and transparent planning process.

METC is a Michigan based corporation engaged in the FERC-jurisdictional transmission of electricity throughout the western and northern portions of Michigan's Lower Peninsula. (3 Tr. 76). METC is totally independent from all electric utilities generating or distributing electricity to retail customers. (*Id.*). In other words, METC **only** is involved in transmission—it does not generate or distribute electricity. It focuses its efforts solely on the transmission system. As part of its utility operations, METC performs yearly planning assessments of its transmission system. This ensures that "the METC system meets all relevant planning criteria and is in compliance with mandatory NERC reliability standards." (3 Tr. 80). These assessments allow METC to "identify potential planning criteria violations and develop solutions to these potential

violations, including, among other things, reconfigurations and/or additions to the transmission system.” (*Id.*). During METC’s 2007 assessment, METC discovered that the unavailability of two of the three 345/138 kV transformers that constitute the primary source of power for the Kalamazoo area “would be projected to overload the remaining transformer at system load levels at or below (and above) 85% of the peak system load level.” (3 Tr. 79). In other words, METC identified a reliability problem that would occur if two out of three transformers on METC’s system in the Kalamazoo area were unavailable for any reason. METC again identified these same overloads in the 2008 planning assessments. (3 Tr. 80).

Because of the identified overloads, METC began a process of identifying several options to resolve the problem. (3 Tr. 81-82, 84; Exhibit A-1).⁶ METC then submitted the Proposed Transmission Line, along with 8 other alternatives, to MISO for evaluation. (3 Tr. 80-81). MISO is the NERC Planning Authority (i.e. the federally endorsed entity) responsible for reliable transmission in parts of Illinois, Indiana, Iowa, Kentucky, Michigan, Minnesota, Montana, North Dakota, South Dakota, Wisconsin, and Manitoba. (3 Tr. 86).

In reviewing proposed reliability projects, MISO follows what is known in the electric utility industry as the “FERC Order 890 transmission planning process.” FERC Order 890 requires that transmission providers such as METC participate in a coordinated and open planning process that satisfies nine separate “planning principles”: Coordination; Openness; Transparency; Information exchange; Comparability; Dispute resolution; Regional coordination; Economic planning studies;

⁶ Citations to “Exhibits” or “Ex.” are citations to those exhibits officially part of the record in this case.

and, Cost allocation. See generally *FERC Order 890*, Docket Nos. RM05-17-000 & RM05-25-000 (Feb. 16, 2007). Generally, this means that the FERC Order 890 Planning Principles require “an open and transparent planning process.” (3 Tr. 87). MISO utilizes a process known as MTEP to satisfy these FERC-mandated obligations in conducting its regional planning of transmission systems. (3 Tr. 86).

MISO’s process ensures “the reliability of the regional transmission system and identifies transmission expansion necessary to support the competitive supply of electric power.” (3 Tr. 87). The process incorporates “the views of many stakeholders and regulators,” while making sure that “transmission projects developed by individual Transmission Owners such as METC will be properly integrated with each other and the region and subjected to scrutiny by and through the MISO stakeholder process.” (*Id.*). As testified to by MPSC Staff, the MPSC’s Generation and Certificate of Need section participates in MISO’s process. (3 Tr. 354). Indeed, they have a “history of involvement in the MTEP process, providing feedback and recommendations on the various transmission projects reviewed by MISO” in the Michigan region. (3 Tr. 358).

MISO considered the Proposed Line in 2009. (3 Tr. 87). This consideration involved “considering other feasible transmission alternatives” in an attempt to determine “the most effective long term solution” for reliability and the mitigation of transmission constraints. (*Id.*). The Line was considered several times by MISO and its stakeholders, including during meetings held on May 14, 2008, December 16, 2008, and July 17, 2009. (3 Tr. 86-87). Stakeholders had an opportunity to consider, evaluate, and comment on the Proposed Line during this process. In fact, as noted by MPSC Staff Witness Steven E. Kulesia, MPSC Staff participated and “conducted a

review” of the Proposed Line during the MTEP process. (3 Tr. 357). MISO approved the Proposed Line in December 2009—its analysis “helped to verify that the project is needed and that other solutions, such as generation re-dispatch would not be feasible.” (3 Tr. 88).

2. After receiving MISO approval, METC began the route evaluation and community outreach process.

Once MISO confirmed the electric reliability need for the transmission line, METC began community outreach before developing the line’s route (i.e. the route the line would take to get from point A to point B). In October of 2010, METC retained Burns & McDonnell—an international engineering, architecture, and consulting firm—to undertake a route selection study, develop alternative routes, and provide a recommendation for route alignment for the line. (Exhibit A-11, p 5). Burns & McDonnell instantly began contacting government officials about the project. (*Id.* at p 10).

In December 2010, METC and Burns & McDonnell held a meeting with Oshtemo, Almena, Antwerp, and Texas Township officials, Kalamazoo and Van Buren County officials, and Michigan Department of Transportation officials to gather information and discuss the Line. (3 Tr. 161-62). Four months later, METC met with the Township supervisor, attorney, planner, clerk, and treasurer to discuss the proposed line and seek information from the Township. (*Id.*). Several field visits and phone calls followed, along with discussions with the Township’s Downtown Development Authority. (*Id.*). To give Township employees a better understanding of the proposed line and to address concerns raised by local residents, METC met with Township employees in June 2011.

(*Id.*). METC also held a “leadership summit” with elected officials and Western Michigan University officials during this time. (*Id.*).

Later, on June 23, 2011, METC held an “open house where maps and other relevant information were available for public review and METC representatives were available to discuss issues and answer questions.” (*Id.*). In July 2011, METC met with a representative from the Twelve Oaks Subdivision Home Owners Association to discuss the Line. (3 Tr. 164). On August 29, 2011, METC once again met with the Township Supervisor and attorney to discuss the proposed line. (3 Tr. 162). Two months later, METC met with several other landowners. (3 Tr. 164). Then in November 2011, METC invited all landowners along identified routes to attend an informational meeting at the Holiday Inn. (3 Tr. 162). During the entire period, METC continued to have ongoing discussions with landowners in the area. (3 Tr. 163).

3. The Township officially opposed the Proposed Transmission Line in November 2011.

Shortly after the informational meeting at the Holiday Inn, the Township amended its “Utility Control” ordinance. (3 Tr. 117; Exhibit A-9; Tr. 293-95). As admitted by Township witness Elizabeth Heiny-Cogswell, this amendment was passed **in direct response** to METC’s announcement of a desire to construct the line. In relevant part, the amended “Utility Control” ordinance provides:

(a) No public or private utility shall hereafter install, construct, relocate or replace any line, pole, main, tower, building, structure or appurtenance thereto within the public streets, roads, alleys or right-of-ways within the Township **without first securing the approval and consent to the same by the Township Board or its duly authorized representative.** This requirement shall not apply to repair of existing utility facilities nor construction of service connections for gas, electrical, telephone, or communication systems leading from such utility distribution lines to single

family homes or isolated business or industrial buildings or structures being provided with such utility service. It shall apply, however, to multiple family developments and multiple commercial and/or industrial developments. The Township recognizes the present existence of utility poles and attachments. New utility lines, wires and other related equipment and facilities may be attached to existing utility poles, if and to the extent that the existing poles can accommodate new attachments. Existing utility poles and attachments may be maintained, replaced and upgraded only with poles and attachments of the same essential characteristics and size.

(b) Any public or private utility seeking such approval and consent **shall submit plans showing the location of the proposed installation, construction or facility; the height, depth and size thereof; and its proximity to existing improvements and other utility facilities within the Township, as well as the public streets, roads, alleys or rights-of-way. The plans shall be accompanied by the documents required in subsection (c) below. Commencing November 25, 2011, all public or private utilities who seek to construct utility lines, wires and related equipment and facilities along, across, over, and/or adjacent to any public street in the Township shall be required to place all lines, wires and/or related facilities and equipment underground within the public road right-of-way and to a point within 250 feet either side of said public right-of-way.** For purposes of this Ordinance, utility lines, wires and/or related facilities and equipment shall include, but not be limited to, lines, wires, equipment and facilities used for electric transmission and distribution, telecommunications, cable television, internet service and other similar purposes.

(c) The Township Board or its duly authorized representative shall not unreasonably withhold such approval and consent where the proposed facilities are **shown to be necessary for the servicing of customers and for the protection or promotion of the health, safety and general welfare of the community. A utility must provide a detailed description of the project, its location and an explanation of why the location was chosen for the proposed utility lines, wires or related equipment, as well as a description of any alternate locations considered and why they were not selected; an analysis of the Township Zoning Ordinance and whether any**

portion of the utility lines, wires or related equipment are located in a zoning district with additional compliance requirements; all information supporting the underlying need of the project; an environmental study of the area affected; information addressing potential effects on public health and safety, as well as any other information requested by the Township. The Township shall have the right and authority to determine the location of the same within the public right-of-way, street, road, alley or public place including verification that the same complies with the Township zoning requirements and the obligation and responsibility, if any, incident to such location and installation imposed upon such utility. Notwithstanding any other provision of this Ordinance once the plan, supporting documents and all documents requested by the Township have been submitted, if no action is taken by the Township Board within 90 days, the approval and consent required by this Ordinance shall be conclusively presumed, and the utility shall be entitled to proceed with construction in accordance with its plans as submitted. However, **the Township may choose to hold a public hearing on the request, depending upon the impact on the community. If a public hearing is held, the utility will be required to attend and present its plan and specifications as required under this Ordinance to the Township Board in a public format, subject to questioning by the Board and its experts.**

(3 Tr. 117-119 (emphasis in original); Exhibit A-9). The plain language of the amended ordinance—which is at the heart of the Township’s Application for Leave to Appeal—requires transmission lines within public rights-of-way **or** within 250 feet of public rights-of-way be located underground, and purports to require METC to prove the transmission line’s necessity by filing an application with the Township board. (*Id.*).

4. **In the face of the Township’s new ordinance, METC undertook another routing study, held further community outreach, and began preparing to file the application.**

The cost of “constructing the line underground would be approximately 5-7 times more per mile.” (Exhibit A-24). Such cost increases are due to “(1) more complex and

expensive underground cables (compared to bare overhead wires); (2) significant excavation and civil engineering work; and, (3) increased labor costs due to installation of the cables, duct banks, and terminations.” (Exhibit A-40). Furthermore, such additional costs do not even account for the increased maintenance costs for underground lines, “which are much higher than the maintenance costs for overhead lines.” (*Id.*) For these reasons, it soon became apparent that compliance with the Ordinance would be costly, time-consuming, and unpredictable. As such, METC made the decision to seek a Certificate from the Commission to approve the construction of the line above ground. Because METC had “engaged landowners in discussions and negotiations focused on obtaining easements” since the original route study was conducted, which provided “additional information” and showed that “several changes in circumstances” had occurred since the original route study was released in June 2011, METC retained Burns and McDonnell to conduct a new route selection survey. (3 Tr. 133; Exhibit A-11). This new study included further landowner input and “incorporated alignments contained in options and easements obtained from various landowners along the route as well as segment and route options responding to questions and concerns raised by local officials and property owners.” (3 Tr. 133-134).

METC also conducted further outreach activities. On June 5, 2012, METC offered in writing to meet with the Township supervisor. (Exhibit A-13). In response, the Township invited METC to attend the Township’s June 12, 2012 meeting. (3 Tr. 163). METC attended that meeting and “previewed the proposed and alternate routes” for the transmission line, “discussed the Act 30 process,” and notified the Township Board of future public meetings that METC would be holding. (*Id.*; Exhibit A-14). METC

also offered in writing to meet with the Almena Township Supervisor. (Exhibit A-15). On June 26, 2012, METC held a public open house followed by a public meeting in Almena Township. (3 Tr. 163). The open house contained METC booths on several topics and allowed interested persons to speak with METC personnel in an informal manner about the route, right-of-way, the need for the line, and environmental issues. (*Id.*). After the open house, METC held a public meeting where members of the public were invited to make any comment on the record that they so desired. (*Id.*). The next day, on June 27, 2012, METC followed the same format and hosted a public open house and public meeting in Oshtemo Township. (3 Tr. 164). Several individuals attended the open house and public meeting and made comments. (*Id.*; Exhibit A-18). After the public meetings, METC continued to reach out to landowners until it filed its application with the MPSC.

D. The MPSC Conducted a Contested Case Pursuant to the Administrative Procedures Act and Granted METC the Certificate to Construct an Overhead Transmission Line.

On July 31, 2012, METC filed its application in this proceeding requesting a Certificate. (Dkt. # 0001). The application was accompanied by prefiled direct testimony and exhibits of Carlo P. Capra, Jason Sutton, Stephen G. Thornhill, Gary R. Kirsh, Steven J. Koster, J. Michael Silva, Dr. Mark A. Israel, and Dr. Dwight Mercer. At the prehearing conference, after accepting METC's proof of service of the notice of hearing and publication, the Administrative Law Judge ("ALJ") granted the interventions of several landowners, the Township, and Consumers Energy. (3 Tr. 19). Commission Staff were also parties to the case.

On November 5, 2012, the Township filed the direct prefiled testimony and exhibits of Elizabeth Heiny-Cogswell and Gregory Milliken. (Dkt. ## 0064-0077). On

November 14, 2012, the Landowners filed the direct prefiled testimony and exhibits of James Dauphinais. (Dkt ## 0085-0090N). Commission Staff filed the prefiled direct testimony and exhibits of Lynn Beck, Naomi Simpson, and Steven Kulesia. (Dkt. # 0101). METC then filed the rebuttal testimony and exhibits of Mr. Capra, Mr. Sutton, Mr. Kirsh, and Mr. Thornhill on December 18, 2012. (Dkt. # 0103.) The evidentiary hearing occurred on January 29, 2013. All witnesses' testimonies and exhibits were bound into the record, and the parties stipulated to the submission of several additional exhibits. (3 Tr. 58-365). Throughout the entire proceeding, most parties conducted extensive discovery, with thousands of pages of documents and interrogatory answers being served over the course of five months.

MPSC Staff supported METC's application, and the landowners and the Township opposed it. While there were several points of contention between the parties during the Commission proceedings which were then raised on appeal, the only issue of contention discussed in the Township's Application for Leave to Appeal is whether METC must comply with the Township's utility control ordinance if the MPSC approved METC's application and issued an order granting a Certificate.

On April 29, 2013, the ALJ issued a Proposal for Decision ("PFD"). (Dkt # 0133). The PFD recommended that, if the MPSC granted the Certificate, that the line's proposed route was reasonable and feasible, the line did not pose an unreasonable threat to health or safety, and that the Certificate should be conditioned on METC either building a portion of the line underground as requested by the Township, or re-opening the record to allow METC to demonstrate further why the line should be above ground. (*Id.*)

Following issuance of the PFD, all parties filed their objections (referred to as “exceptions” under MCL 24.281(3)) to the ALJ’s proposed findings (See Dkt ## 0134-0141). Three months later, on July 29, 2013, the Commission issued a 27-page Order granting METC the Certificate. The Commission approved the transmission line’s route as reasonable and feasible, and noted that “the Commission’s grant of the CPCN preempts Oshtemo’s ordinance.” (*Id.*, pp 25-26).⁷ The Township and several landowners appealed as of right to the Court of Appeals.

E. The Court of Appeals Affirmed the MPSC and Held that the Certificate took Precedence Over the Ordinance and that Act 30 was Constitutional.

On November 18, 2014, the Court of Appeals issued the Opinion, which affirmed the MPSC’s order granting the Certificate. The Opinion pointed out that once the Commission “issued [the Certificate] allowing METC to build such a line, Oshtemo Township’s ordinance conflicted with [the Certificate].” (Opinion, p 11). The Court of Appeals noted that “[u]nder the plain language of MCL 460.570(1), that certificate took precedence over Oshtemo Township’s conflicting ordinance that required that a portion of the transmission line be constructed underground.” (*Id.*) The Opinion rejected the Township’s argument that such a conclusion violated the Township’s constitutional authority to regulate municipal affairs and rights-of-way:

MCL 460.570(1) is not an unconstitutional blanket usurpation of Oshtemo Township’s ability to pass regulations and ordinances regarding its municipal affairs. The Legislature has the authority to enact laws that limit the way in which a local government can exercise the power granted to it under

⁷ The Commission’s order also addressed many other issues contested by the parties. Because the Township has only raised issues about Act 30’s and the Certificate’s effect on the Ordinance, METC will not discuss those other issues.

Const 1963, art 7, § 29. See *Lansing*, 275 Mich App at 433; see also Const 1963, art 7, § 22.

(Opinion, p 11, citing *Lansing v State of Michigan*, 275 Mich App 423; 737 NW2d 818 (2007), Const 1963, art 7, §§ 22, 29). The Opinion also rejected the Township's contention that the MPSC was required to find a conflict between the Ordinance and some other state law, finding that such argument "finds no support in the language of any portion of Act 30, particularly not in MCL 460.570(1), or in any case law." (*Id.*) Finally, the Opinion held that Act 30 "is not an unconstitutional delegation of power." (*Id.*)⁸ On December 19, 2014, the Township filed with this Court its Application for Leave to Appeal.

ARGUMENT

I. STANDARD OF REVIEW.

The Township seeks leave from this Court, but never even cites a standard of review for obtaining that relief, let alone analyze why the Township's request satisfies the Michigan Court Rules' standards for leave. See MCR 7.302(B). Instead, the Township merely contends that the Court of Appeals was in error, which error resulted in "manifest injustice," and is of "statewide importance." (Application for Leave to Appeal, p iii). Neither of these phrases are referenced in MCR 7.302(B), but even if they were, the Application for Leave to Appeal never explains how manifest injustice has resulted or why this is a matter of "statewide concern." For this reason alone, the Court should deny the Application for Leave.

⁸ The Opinion also rejected arguments raised by landowners relating to the line's necessity and route, and Constitutional Due Process. Because the Township has not raised those holdings in its Application for Leave to Appeal, they will not be addressed by METC.

Setting aside the absence of an analysis of MCR 7.302(B), the Township's bottom line argument would require this Court to reverse an affirmance of a Commission order interpreting a statute the MPSC is charged with administering, and strike down a portion of Act 30 as unconstitutional. In order to overturn a Commission order, the burden of proof is on the party aggrieved by the order to "show by clear and satisfactory evidence that the order of the commission complained of is unlawful or unreasonable." *In re MCI Telecommunications Complaint*, 460 Mich 396, 427; 596 NW2d 164 (1999), citing MCL 462.26(8). To successfully demonstrate that an order is unlawful, "there must be a showing that the commission failed to follow some mandatory provision of the statute or was guilty of an abuse of discretion in the exercise of its judgment." 460 Mich at 427, citing *Giaras v Public Service Comm'n*, 301 Mich 262, 269; 3 NW2d 268 (1942). To prove a Commission order unreasonable, a party must show that the order is unsupported by the evidence. *City of Marshall v Consumers Power Co (On Remand)*, 206 Mich App 666, 676; 523 NW2d 483 (1994), *lv den*, 449 Mich 861; 535 NW2d 793 (1995), citing *Associated Truck Lines, Inc v Public Service Comm'n*, 377 Mich 259; 140 NW2d 515 (1966). In addition, the Commission's interpretation of a statute that the Commission is charged with administering is "entitled to respectful consideration and ought not to be overruled without cogent reasons." *In re Rovas*, 482 Mich 90, 108; 754 NW2d 259 (2008), citing *Boyer-Campbell v Fry*, 271 Mich 282, 296-97; 260 NW 165 (1935).

Finally, although the constitutionality of a statute is a question of law that is reviewed de novo, *Tolsdorf v Griffith*, 464 Mich 1, 5; 626 NW2d 163 (2001), statutes are presumed to be constitutional. *Phillips v Mirac, Inc*, 470 Mich 415, 423; 685 NW2d 174

(2004). Indeed, “[e]very reasonable presumption or intendment must be indulged in favor of the validity of an act, and it is only when invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution that a court will refuse to sustain its validity.” *Phillips*, 470 Mich at 423, quoting *Cady v Detroit*, 289 Mich 499, 505; 286 NW 805 (1939).

The Township asks this Court to grant leave to appeal and disregard the Commission’s factual findings and interpretation of Act 30, the Court of Appeal’s interpretation of Act 30’s plain language, and the presumption that all statutes are constitutional. The Township cannot satisfy any of the burdens to be successful, and this Court should deny the Township’s Application.

II. THE COURT OF APPEALS PROPERLY CONCLUDED THAT THE CERTIFICATE TAKES PRECEDENCE OVER THE TOWNSHIP’S UTILITY CONTROL ORDINANCE.

The Township first contends that the Court of Appeals “clearly erred in striking down the Township’s utility ordinance provision requiring placement of public utility lines crossing a public road underground thereby nullifying the Township’s authority under const 1963, art 7, § 29.” (Application for Leave to Appeal, p 4). Before addressing the legal merits of this argument, it is critical to point out two flaws with this entire argument.

First, the Court of Appeals **did not** “strike down” the Ordinance. The Ordinance still exists—the Court of Appeals, like the MPSC, merely concluded that there was a conflict between the Certificate, which authorized an above-ground line, and the Ordinance, which required portions of the line to be constructed underground. (Opinion, p 11). Under Act 30’s plain language, those conflicting provisions do not apply to the transmission line “for which the commission has issued a certificate.” MCL 460.570(1). In other words, the Ordinance’s requirements to place the line underground still apply to

any other public utility line constructed in the Township. Nowhere in the MPSC's order or in the Court of Appeals' Opinion is the Ordinance "struck down." Indeed, both the Township and certain amici below attempted to make similar arguments to the Court of Appeals, but the Court of Appeals belied such contentions, noting that "[c]ontrary to arguments made by Oshtemo Township and amici Michigan Townships Association, et al, the PSC did not hold that Act 30 preempted all local regulation by the Township, and did not eliminate the authority granted to Oshtemo Township by Const 1963, art 7, § 29 to control its roads and rights-of-way." (Opinion, p 10). Thus, the entire notion that the Court of Appeals "struck down" the Ordinance is simply not true.

Second, the Township mischaracterizes the Ordinance's underground requirements. The Ordinance does much more than require the "placement of public utility lines crossing a public road underground." (Application for Leave to Appeal, p 4). It actually requires "all public or private utilities who seek to construct utility lines, wires and related equipment and facilities along, across, over, and/or adjacent to any public street in the Township shall be required to place all lines, wires and/or related facilities and equipment underground within the public road right-of-way and to a point within 250 feet either side of said public right-of-way." (3 Tr. 117-119 (emphasis in original); Exhibit A-9). The Opinion also recognized that the "ordinance required METC to locate the proposed line underground in any area in which the line would come within 250 feet of a public right-of-way." (Opinion, p 3).

As the above makes clear, two of Township's foundational points—that the Ordinance was "struck down" and that the Ordinance only applies to road crossings—are not true. Even setting aside these flaws, however, there is no merit to the

Township's claims. The Opinion did not "nullify" the Township's authority. Instead, the Court of Appeals properly interpreted Act 30's plain language to properly conclude that the Ordinance's requirements did not apply to the transmission line. Nothing about the Opinion's conclusions were unconstitutional.

A. The Certificate Takes Precedence Over the Ordinance Because the Ordinance Conflicts with the Certificate and Regulates the Location and Construction of the Transmission Line Covered by the Certificate.

1. Section 10 of Act 30 Applies Because the Certificate and the Ordinance Conflict.

The Township amended the Ordinance in direct response to the transmission line. The Ordinance requires transmission lines within public rights-of-way or within 250 feet of public rights-of-way be located underground. (3 Tr. 118; Ex. A-9). This is a problem, because underground line construction is 5 to 7 times more expensive to build, and is much more difficult and expensive to maintain. (Ex. A-24; Ex. A-40). The Ordinance also requires utilities to "submit plans showing the location of the proposed installation, construction or facility; the height, depth and size thereof; and its proximity to existing improvements and other utility facilities within the Township, as well as the public streets, roads, alleys or rights-of-way." (3 Tr. 118; Ex. A-9) Furthermore, the Township may hold a hearing and require a utility to prove a project's necessity, among other things. (*Id.*). Avoiding this process—which would require expensive and unnecessary undergrounding of transmission lines as well as a public hearing before an openly hostile elected board with no utility experience or knowledge of transmission planning—was a chief reason METC filed its application with the MPSC.

Section 10 of Act 30 is clear: "[i]f the commission grants a certificate under this act, that certificate shall take precedence over a conflicting local ordinance, law, rule,

regulation, policy, or practice that prohibits or regulates the location or construction of a transmission line for which the commission has issued a certificate.” MCL 460.570(1). Based on this plain language, the Opinion concluded “once the PSC issued CPCN allowing METC to build such a line, Oshtemo Township’s ordinance conflicted with the CPCN. Under the plain language of MCL 460.570(1), that certificate took precedence over Oshtemo Township’s conflicting ordinance that requires that a portion of the transmission line be underground.” (Opinion, p 11). The Township claims that this holding violates const 1963, art 7, § 29, but does not provide any analysis of how such a violation has occurred, and instead simply quotes, without argument or explanation, a large portion of Justice Markman’s dissent from a denial of a leave application in *City of Lansing v Michigan & Wolverine Pipe Line Co*, 480 Mich 1104; 745 NW2d 100 (2008). (Application for Leave to Appeal, pp 4-7). Concluding that the Certificate takes precedence over the Ordinance, however, does not violate Michigan’s Constitution. In fact, it is in line with the Constitution’s plain language and this Court’s prior precedent.

Here, the Ordinance very clearly regulates the transmission line’s location and construction. It reserves the Township’s right to “determine the location” of the line, and allows the Township to require that the transmission line be constructed underground. (Ex. A-9). The Certificate, on the other hand, approved METC’s application to construct an “overhead transmission line” that would be located on a very specific route. This means that the Ordinance was a “conflicting local ordinance,” and that under Act 30’s plain and unambiguous language, the Commission’s Order “take[s] precedence” over the Ordinance. MCL 460.570(1). As recognized by the Court of Appeals, it is the Certificate—issued pursuant to Act 30—that conflicts with the Ordinance. (Opinion, pp

10-11). Once it is determined that the Certificate conflicts with the Ordinance, the analysis is simple—Section 10 of Act 30 applies.

2. The Ordinance Impinges on Matters of Statewide Concern and is Inconsistent with State Law Because it Conflicts with the Certificate Issued by the Commission.

As noted by the Township, Michigan's Constitution grants local governments "reasonable control" over their streets and public places. See const 1963, art 7, § 29. The Opinion also recognized that "Const 1963, art 7, § 29 makes a utility's use of public places and rights of way subject to local approval." (Opinion, p 10). Importantly, however, the Opinion also recognized that "[a] local government is authorized to enact resolutions and ordinances relating to such matters; however, those enactments are "subject to the constitution and law." (*Id.* citing const 1963, art 7, § 22). The Township claims that article 7 section 22's limitations are "general" and that art 7, section 29's provisions should "take precedence." (Application for Leave to Appeal, p 7). That argument, however, is not supported by the Constitution, statutes, or this Court's prior precedent interpreting these constitutional provisions.

In 2006, this Court reconciled the City of Taylor's "constitutional authority to exercise 'reasonable control' over its streets with the [Commission's] broad regulatory control over public utilities." *City of Taylor*, 475 Mich at 112. In *City of Taylor*, the plaintiff city passed an ordinance that required the underground relocation of utility wires along Telegraph Road at the utility company's sole cost. The defendant utility company challenged the ordinance, claiming that it conflicted with certain rules and regulations promulgated by the Commission. This Court recognized that "if" a state law—in that particular case a Commission regulation—conflicts with a local ordinance, **the local ordinance must cede**. To that end, the Court ruled that "...a local unit of government

may exercise control over its ‘highways, streets, alleys, and public places’ **as long as that regulation does not conflict with state law.**” *Id.* at 108 (emphasis added). The Court then reaffirmed Michigan precedent holding that “a municipality’s exercise of reasonable control over its streets **cannot impinge upon matters of statewide concern** nor can a municipality regulate in a manner inconsistent with state law.” *Id.*, at 112. Thus, under this Court’s prior holding in *City of Taylor*, a local government cannot impinge on matters of statewide concern, nor can it regulate inconsistent with state law. In this instance, the Ordinance does both.

There can be no question that Act 30’s subject matter—the location and construction of electric transmission lines—is a matter of statewide concern. In fact, Act 30 even pronounces that “[t]ransmission of electricity is an essential service.” MCL 460.563. This declaration, along with Act 30’s legislative history and the evidence in this case, demonstrates the importance of electric transmission to the State and Region.

In 1995, the Legislature determined that electric transmission lines were so important that the State should create a centralized siting authority. Before Act 30, transmission line projects were governed by a localized process that resulted in a patchwork of differing regulations. At that time, transmission line projects exposed “multi-county projects, **designed primarily for the economic benefit of the state**, to the construction and siting whims and uncertainties of each local jurisdiction traversed by the planned transmission line.” Senate Majority Policy Analysis: Electric Line Certification, Tom Atkins, SB 408, March 22, 1995 (emphasis added). Accordingly, a “[s]tate-level siting authority would be preferable to what they consider a patchwork of regulations, and would ensure the uniform balancing of competing interests.” *Id.* In

other words, the Legislature, recognizing the statewide importance of transmission projects, determined that in certain instances, a centralized siting authority should be able to consider evidence and issue an order taking precedence over a patchwork of local regulations aimed at stopping transmission line projects.

The record evidence in this case also proves that electric transmission projects are a matter of statewide significance. Despite being only approximately 7 miles long and located primarily in one township, the transmission line will be interconnected to the broader electric transmission grid. Importantly, despite its relatively short length and limited location, the transmission line **will alleviate the potential for brownouts and blackouts in the Kalamazoo and Battle Creek regions.** (3 Tr. 80). It will also increase load serving capacity and create a more efficient system that will require less power produced (i.e. less generation of power) during peak times. (3 Tr. 88; 3 Tr. 360). Despite these region-wide critical benefits, Oshtemo Township attempted to serve as a roadblock to the line's construction, and even passed the Ordinance in direct response to learning that METC desired to build the transmission line. (3 Tr. 293). This was done with no regard to the fact that the cost of "constructing the line underground would be approximately 5-7 times more per mile." (Exhibit A-24). In other words, the Township had no regard for the statewide issues involved, and only had local interests—whatever those might be—in mind. Such actions undoubtedly "impinge on matters of statewide concern," and are not permitted under *City of Taylor*. This holds especially true here, where the Ordinance conflicts with state law.

In conflicting with the Certificate, not only does the Ordinance impinge on matters of state wide concern, perhaps more importantly, it conflicts with state law—which is

absolutely prohibited under *City of Taylor*. In *City of Taylor*, the plaintiff city passed an ordinance that required the underground relocation of electric utility lines along Telegraph Road at the electric utility's cost. *Id.* at 118-119. Under statutory authority granted to it by the Michigan Public Service Commission Act, PA 3 of 1939, MCL 460.6 (the "MPSC Act"), however, the Commission had promulgated rules governing the replacement of existing overhead distribution lines. *Id.* at 118. The electric utility challenged the City of Taylor's ordinance, claiming that it conflicted with the MPSC's rules. *Id.* This Court recognized that "if" a state law conflicts with a local ordinance, the local ordinance must cede. Although the Court transferred the case to the Commission to ultimately determine if there was a conflict between the ordinance at issue and the MPSC's rules, in so doing, the Court pronounced that "a local unit of government may exercise control over its 'highways, streets, alleys, and public places' **as long as that regulation does not conflict with state law.**" *Id.* at 108. In other words, if the Commission found that the City of Taylor's ordinance conflicted with the Commission's rules, the City's ordinance would be invalid.

The analysis from *City of Taylor* applies in this instance, and leads to the conclusion that the Certificate takes precedence over the Ordinance. Just as the Commission had statutory authority to promulgate rules governing relocation of distribution lines in *City of Taylor*, the Commission in this instance had statutory authority to issue orders under Act 30 addressing the location and construction of electric transmission lines. In fact, the Commission's authority in this instance is even **clearer** than the general authority involved in *City of Taylor*. At issue in that case were rules promulgated by the MPSC pursuant to its **general regulatory authority** created

by the MPSC Act, which grants the MPSC “complete power and jurisdiction to regulate all public utilities [including]...all other matters pertaining to the formation, operation, or direction of public utilities.” *City of Taylor*, 475 Mich at 118, citing MCL 460.6. Act 30, however, grants the Commission much more specific authority by creating an application, notice, and contested case process to address transmission line location and construction, and specifically directing the Commission to issue orders on such applications within one year. MCL 460.568(3). In fact, the limitations on the Township go even beyond just Act 30 -- the Michigan Zoning Enabling Act also states that all zoning is “subject to” “[t]he electric transmission line certification act, 1995 PA 30, MCL 460.561 to 460.575.” MCL 125.3205(1)(a). To the extent that Article 7, section 29 of Michigan’s constitution did not save the City of Taylor’s ordinance if the ordinance conflicted with MPSC rules promulgated under the MPSC’s general regulatory authority granted by the MPSC Act, there can be no question that Article 7, section 29 does not save the Ordinance if it conflicts with a certificate issued pursuant to a very specific statutory mandate as set forth in Act 30. It would be nonsensical to conclude that local ordinances cannot conflict with valid MPSC rules promulgated under general authority, but somehow **can** conflict with a validly issued MPSC certificate pursuant to specific statutory authority. The Court of Appeals recognized this point. Indeed, the Opinion includes a lengthy discussion of the *City of Taylor* case. (Opinion, p 9). The Township’s arguments, therefore, are invalid.

3. The Ordinance is not Related to the Township’s Consent under Article 7, § 29.

The Township also claims that the Township’s “consent is subject to the public utilities placing the electric transmission line under the public streets.” (Application for

Leave to Appeal, p 7). Again, the first problem with this argument is that the Ordinance requires much more than placing lines under streets. Regardless, this argument has no merit.

First, the Township's argument runs directly contrary to the *City of Taylor* holding. The *City of Taylor* Court held that a local government **cannot** regulate inconsistent with state law. To agree with the Township's argument, however, would mean that local governments may avoid this prohibition by claiming that the Township's consent is conditioned on the local government's regulation that is inconsistent with Act 30 and the Michigan Zoning Enabling Act. Such an argument is quite clearly invalid—it swallows the *City of Taylor* holding entirely. It also contradicts a published Court of Appeals decision discussed at length by the Opinion.

In *City of Lansing v State of Michigan*, 275 Mich App 423; 737 NW2d 818 (2007), the Court of Appeals addressed a city's ability to withhold consent to a utility locating within the city's rights-of-way. The Court of Appeals concluded: “[b]ecause a city’s general authority to adopt resolutions and ordinances is subject to the constitution and law, and a city’s authority to grant or withhold consent to use its highways, streets, alleys, and other public places can only be exercised through an ordinance or resolution, **it follows that a city’s ability to grant or withhold consent is also subject to the constitution and laws.**” 275 Mich App at 433. The Court of Appeals noted that the Legislature, by statute, could limit a municipality’s authority and control with respect to utilities and public areas. *Id.* This reasoning from *City of Lansing* actually applies with greater force in this instance, because the current dispute involves a township instead of a city. This is important, because Article 7, section 17 of

Michigan's Constitution provides: "[e]ach organized township shall be a body corporate with powers and immunities provided by law." Indeed, townships, unlike cities, "have no police power on their own, but only have those power and immunities which are provided by law." *Detroit Edison Co v Richmond*, 150 Mich App 40, 47-48; 388 NW2d 296 (1986). In other words, just as with Lansing in the *City of Lansing* case, the consent power under Article 7, section 29 is not self-executing. Thus, in Michigan, local units of government have no inherent authority on their own to regulate zoning. The State must specifically grant them authority. *Lake Township v Sytsma*, 21 Mich App 210, 212; 175 NW2d 337 (1970). Accordingly, the Township's authority is limited by state laws, including Act 30, **and** the Michigan Zoning Enabling Act, which states that all zoning is "subject to" "[t]he electric transmission line certification act, 1995 PA 30, MCL 460.561 to 460.575." MCL 125.3205(1)(a).

As with the *City of Taylor* case, the Opinion included a lengthy discussion of the *City of Lansing* decision, noting that the Legislature may properly "limit the manner and circumstances under which a city may grant or withhold consent under [art 7] § 29." (Opinion, p 10, citing *City of Lansing*, 433-34). And the Opinion concluded that the "Legislature has the authority to enact laws that limit the way in which a local government can exercise the power granted to it under Const 1963, art 7, § 29." (Opinion, p 11, citing *City of Lansing*, 275 Mich App at 322 and Const 1963, art 7, § 22). These conclusions are based on the Constitution's plain language, long-standing precedent, and plain statutory language. To grant the Township's request, reverse the Opinion, and hold that a Certificate does not take precedence over the Ordinance would

be to completely ignore Act 30 and the *City of Taylor* holding—the Court of Appeals recognized this, and rejected the Township’s arguments. This Court should as well.

III. THE OPINION ANALYZED THE OBVIOUS CONFLICT BETWEEN THE CERTIFICATE AND THE ORDINANCE.

As previously explained, Section 10 of Act 30 is clear: “[i]f the commission grants a certificate under this act, that certificate shall take precedence over a conflicting local ordinance, law, rule, regulation, policy, or practice that prohibits or regulates the location or construction of a transmission line for which the commission has issued a certificate.” MCL 460.570(1). Despite the plain language of the Act and the clear conflict that exists between the Certificate and the Ordinance, the Township devotes a substantial portion of its application to arguing that the Commission and the Court of Appeals failed to analyze whether the Ordinance conflicts with the Certificate. The Township claims the MPSC and Court of Appeals erred by failing to conduct an analysis of “whether a conflict exists between the Township’s Ordinance and the Certificate of Public Convenience and Necessity.” (Township Brief, p 10).

The Township, however, completely ignores the relevant portion of the Court of Appeals decision, which expressly considered the conflict as follows:

METC used Act 30 to apply for a CPCN to build a new transmission line. In making its application, METC was required to include any zoning ordinance that would affect, i.e., regulate the location or construction of, the proposed route. MCL 460.567(2)(d). Oshtemo Township’s relevant ordinance, if applicable, would require METC to locate a portion of its proposed transmission line underground. The ordinance did not provide for any exceptions to this requirement. METC determined that locating a portion of the proposed line underground would be prohibitively expensive, and so sought a CPCN for a line to be constructed entirely above ground. The PSC was entitled to accept METC’s evidence regarding the cost and preferability of constructing a line above ground, notwithstanding the fact that the record

also contained contradictory evidence. See *Great Lakes Steel Div of Nat'l Steel Co v Public Service Comm*, 130 Mich App 470, 481-482; 344 NW2d 321 (1983). **The PSC issued a CPCN allowing METC to construct a transmission line that was entirely above ground. The PSC was entitled to find that METC was not required to comply with Oshtemo Township's ordinance, but was not required to do so. However, once the PSC issued CPCN allowing METC to build such a line, Oshtemo Township's ordinance conflicted with the CPCN. Under the plain language of MCL 460.570(1), that certificate took precedence over Oshtemo Township's conflicting ordinance that required that a portion of the transmission line be constructed underground.** MCL 460.570(1) is not an unconstitutional blanket usurpation of Oshtemo Township's ability to pass regulations and ordinances regarding its municipal affairs. The Legislature has the authority to enact laws that limit the way in which a local government can exercise the power granted to it under Const 1963, art 7, § 29. See *Lansing*, 275 Mich App at 433; see also Const 1963, art 7, § 22. The argument that the PSC's analysis was required to expand beyond the conclusion that the CPCN took precedence over Oshtemo Township's conflicting local ordinance, and that the PSC was required to determine if the ordinance conflicted with some state law other than the CPCN, finds no support in the language of any portion of Act 30, particularly not in MCL 460.570(1), or in any case law.

(Opinion, pp 10-11 (emphasis added)).

As the Court of Appeals explained, the Ordinance requires that a portion of the Project must be constructed below ground; the Certificate permits the construction of the Project above ground. A conflict could not be clearer. Plainly, the Court of Appeals addressed the issue and concluded that a conflict exists.

The MPSC similarly concluded that under sections 3 and 10 of Act 30 the "grant of the CPCN preempts Oshtemo's ordinance." (MPSC Order at 26). As there was a blatant conflict between the Certificate and the Ordinance, the Certificate controlled.

The Township cites *Detroit Edison Co v City of Wixom*, 382 Mich 673; 172 NW2d 382 (1969), to contend that the MPSC was required to find an “ACTUAL conflict between local Ordinances and the State law or regulation.” (Township’s Br. at 11). It is worth noting that *Wixom* was decided 26 years before Act 30 became law. Thus, it did not address the issues raised in this matter. Indeed, at the time of *Wixom*, “the public service commission statute d[id] not vest the commission with authority to determine the routes of high tension lines except as those routes bear upon ‘rates, fares, fees, charges, services, rules, conditions of service,’” a statement which no longer holds true. *City of Wixom, supra*, 683.

Act 30 allows a utility to seek a Certificate after an ordinance is passed—otherwise, there would be no reason to require an applicant to include “a description of the location and manner in which [a] zoning ordinance prohibits or regulates the location or construction of the proposed route.” MCL 460.567. As already explained, history shows that the entire reason Act 30 exists is to avoid local governments passing ordinances to block or regulate transmission line construction.

At bottom, the Township appears to be arguing that application of Section 10’s express preemption is unfair. But “[t]he fact that the statute appears unwise or unfair . . . is for the determination of the Legislature, and the law must be enforced as written.” *Smith v Cliffs on the Bay Condo Assoc*, 463 Mich 420, 430; 617 NW2d 536 (2000). There is simply no avoiding that the Certificate conflicted with the Ordinance and, therefore, took precedence over the Ordinance. Therefore, this Court should deny the application for leave to appeal.

IV. ACT 30 IS NOT AN UNCONSTITUTIONAL DELEGATION OF AUTHORITY.

The Township also spends a substantial portion of its brief citing and quoting case law related to the doctrine of unconstitutional delegation of authority. (Township's Brief, p 12-14). The Township, however, fails to provide any detail about how Act 30 unconstitutionally delegates legislative authority in this case beyond a conclusory statement that the Act somehow grants the Commission arbitrary and unlimited power to preempt local ordinances. (*Id.* at 11). An actual review of Act 30 defuses the argument.

A. The Constitution Requires That the Legislature Provide the Commission with Reasonably Precise Standards for Granting Orders Related to Locating and Constructing Transmission Lines.

Article 4, section 1 of the Michigan Constitution prohibits the delegation of "legislative power." In the context of delegation of power to a state agency, department, or commission, the non-delegation doctrine is a well-recognized age-old concept. The general rule has been stated several times:

There is no doubt that a legislative body may not delegate to another its lawmaking powers. It must promulgate, not abdicate. This is not to say, however, that a subordinate body or official may not be clothed with the authority to say when the law shall operate, or as to whom, or upon what occasion, provided, however, that the standards prescribed for guidance are as reasonably precise as the subject matter requires or permits.

Detroit v Detroit Police Officers Ass'n, 408 Mich 410, 458; 294 NW2d 68 (1980) (quoting *Osius v St Clair Shores*, 344 Mich 693, 698; 75 NW2d 25 (1956)).

In Michigan, a law does not unconstitutionally delegate legislative power if it contains "standards" "as reasonably precise as the subject matter requires or permits."

Department of Natural Resources v Seaman, 396 Mich 299, 309; 240 NW2d 206, 210

(1976). This Court applies a presumption of constitutionality and requires that the act be read as a whole before the law can be struck as an unconstitutional delegation of legislative authority. *Id.*

Michigan courts applying the non-delegation doctrine have examined the act's purpose, in addition to its provisions, when deciding whether a law unconstitutionally delegates legislative authority. See, e.g., *Detroit v Detroit Police Officers Ass'n*, 408 Mich 410, 457-66; 294 NW2d 68 (1980); *S & S Industries, Inc. v. Director of Bureau of Workers' Disability Compensation*, 113 Mich App 355, 363; 317 NW2d 625 (1982) ("Given the broad purposes of the act and the wide variety of circumstances in which its mandate may be applied, the Legislature was as precise as it could have been in enacting in MCL 418.611..."). "The preciseness of the standard will vary with the complexity and/or the degree to which subject regulated will require constantly changing regulation." *Dep't of Natural Resources v Seaman*, 396 Mich 299, 309; 240 NW2d 206 (1976). This Court has recognized that:

[I]t is clear from judicial decisions in other states and from our own decisions subsequent to *Osius* that this Court implicitly recognized the fact **that a flexible, adaptable rule regarding "standards" is necessitated by the exigencies of modern day legislative and administrative government.**

Westervelt v. Natural Resources Comm'n, 402 Mich 412, 436, 263 NW2d 564 (1978) (emphasis added).

It is important to note that, since the latter quarter of the twentieth century, this Court has generally approved of the United States Supreme Court's application of the unconstitutional-delegation-of-legislative-authority doctrine, or rather, the **lack** of such a doctrine. See, e.g., *Taylor v Smithkline Beecham Corp*, 468 Mich 1, 9; 658 NW2d 127

(2003). Indeed, since the middle of the 1930s, the United States Supreme Court has not struck down a single law based upon an alleged unconstitutional delegation of legislative authority. *Id.* (“In the federal courts these improper delegation challenges to the power of federal regulatory agencies have been uniformly unsuccessful since the advent of large regulatory agencies in the 1930s.”). And since the Michigan Supreme Court decided *Seaman* in 1976, research reveals only **one** instance of this Court striking down a law under this doctrine. With these principles in mind, it is clear that Act 30 does not unconstitutionally delegate power to the Commission.

B. Act 30 Provides the Commission with Reasonably Precise Standards for Granting Orders Related to Locating and Constructing Transmission Lines.

Reading Act 30 in its entirety and applying a presumption of constitutionality, Act 30 does not violate Article 4, section 1 of Michigan’s Constitution for at least three separate reasons. ***First***, it “is difficult or impracticable to lay down a definite comprehensive rule without destroying the flexibility necessary to enable administrative officials to carry out the legislative will.” *State Highway Comm’n v Vanderkloot*, 43 Mich App 56, 66; 204 NW2d (1972). As discussed previously, the legislative will, within the context of Act 30, was to ensure that electric utilities could proceed with important and transmission projects that affect the entire state without having localized concerns serve roadblocks to such projects. The Legislature, in its wisdom, concluded that a transmission line should only be approved under Act 30 when, among other things, “[t]he quantifiable and nonquantifiable public benefits of the proposed major transmission line justify its construction.” MCL 460.568(5)(a).

The decision to approve a major transmission line construction project thus comes down to, among other things, a determination that the “public benefits” “justify its

construction.” As the Court has stated, the more complicated and multifaceted the area of regulation, the broader the legislative grant of authority may be. *Westervelt, supra* at 436; *Seaman, supra* at 309. Assessing the “public benefits” associated with the construction of a transmission line requires the MPSC to consider a multitude of factors, many of which will depend on the specific location of the proposed transmission line, the reason the utility proposes building the line, as well as the local regulations currently applicable to the line. Moreover, the factors will change over time as circumstances (including technological advances) evolve. In this way, Act 30 is like the acts upheld in *Vanderkloot*, where the Court of Appeals upheld a “necessity” standard in the Public Highway Purposes Act, which granted condemnation powers to the State Highway Commissioner. The court in that instance recognized the implicit incorporation of all of the factors bearing on a necessity determination, and determined that it was a sufficient standard to uphold the act at issue. *Vanderkloot, supra*, 67-68.

Act 30 is also similar to the law considered in *Kent County Aero Bd v Dep’t of State Police*, 239 Mich App 563; 609 NW2d 593 (2000), wherein the Court of Appeals upheld a law requiring the director of the State Police Department to “locate [a communications] system at a site ‘necessary to implement the Michigan public safety communications system’ and notify local units of government of the site selected and ‘the requirements necessary for a site.’” *Id.* at 587-88. In considering the law, the court concluded “that it was neither practical nor feasible for the Legislature to designate specific locations for the tower, or for the statute to be more precise. In order for the communications system to operate in an effective and unified manner, the director must

be afforded considerable flexibility in locating appropriate areas for the towers and purchasing land.” *Id.* at 588.

Act 30 is also similar to the statute considered in *Attorney General v Public Service Commission*, 161 Mich App 506; 411 NW2d 469 (1987). In that case, the Attorney General claimed, among other things, that the Legislature had unconstitutionally delegated its authority by allowing the MPSC to incorporate a gas cost recovery clause in the rates or rate schedules of a utility. *Id.* at 509. At the time, MCL 460.6h(1)(b) defined a gas cost recovery clause as “an adjustment clause in the rates or rate schedule of a gas utility which permits the monthly adjustment of rates for gas in order to allow the utility to recover the booked costs of gas sold by the utility if incurred **under reasonable and prudent policies and practices.**” *Id.* (emphasis added). The law at issue provided that the MPSC could “incorporate a gas cost recovery clause in the rates or rate schedule of a gas utility, but is not required to do so.” *Id.* at 510. The Court of Appeals concluded that the act was not an unconstitutional delegation of legislative authority:

Reading the gas cost recovery statute as a whole, it meets the requirement that it provide standards as reasonably precise as the subject matter requires or permits. The statute provides that a gas cost recovery clause cannot be approved to recover booked costs of gas sold by the utility if those costs are not incurred **under policies and practices which are both reasonable and prudent.** The statute also contains an **extensive scheme for review of gas costs and for participation by interested parties in the application approval process.** These necessary standards, required for approval of a gas cost recovery clause, provide sufficient guidelines for the commission, in the exercise of its discretion, to approve or disapprove an application. The provisions in the statute that provide for participation by interested parties at the hearings before the commission satisfy due process requirements.

Id. at 510-11 (emphasis added).

Just like the determination that costs would be reasonable and prudent and based on prudent practices, the determination under Act 30 that the construction of a major transmission line's construction is justified by its public benefits depends on a multitude of factors that will change over time. Thus, as in the instant case, creating definite standards would be infeasible and deprive the MPSC of the flexibility required to respond to the many and amorphous factors that will determine whether the transmission line's "public benefits" justify its construction. Because of the multitude of factors necessary to determining whether "public benefits" justify construction of a major transmission line, the Act is as reasonably precise as the subject matter requires or permits.

Second, Act 30 imposes a rather strict scheme for reviewing transmission line projects. The application for a CPCN must contain all of the following:

- (a) The planned date for beginning construction.
- (b) A detailed description of the proposed major transmission line, its route, and its expected configuration and use.
- (c) A description and evaluation of 1 or more alternate major transmission line routes and a statement of why the proposed route was selected.
- (d) If a zoning ordinance prohibits or regulates the location or development of any portion of a proposed route, a description of the location and manner in which that zoning ordinance prohibits or regulates the location or construction of the proposed route.
- (e) The estimated overall cost of the proposed major transmission line.
- (f) Information supporting the need for the proposed major transmission line, including identification of known

future wholesale users of the proposed major transmission line.

(g) Estimated quantifiable and nonquantifiable public benefits of the proposed major transmission line.

(h) Estimated private benefits of the proposed major transmission line to the applicant or any legal entity that is affiliated with the applicant.

(i) Information addressing potential effects of the proposed major transmission line on public health and safety.

(j) A summary of all comments received at each public meeting and the applicant's response to those comments.

(k) Information indicating that the proposed major transmission line will comply with all applicable state and federal environmental standards, laws, and rules.

(l) Other information reasonably required by the commission pursuant to rule.

MCL 460.567 (emphasis added). After receiving this information, the MPSC must hold a contested case proceeding, wherein each affected municipality and landowner obtains full intervenor status as of right. MCL 460.568(2). To issue a Certificate the MPSC must determine:

(a) The quantifiable and nonquantifiable public benefits of the proposed major transmission line justify its construction.

(b) The proposed or alternative route is feasible and reasonable.

(c) The proposed major transmission line does not present an unreasonable threat to public health or safety.

(d) The applicant has accepted the conditions contained in a conditional grant.

MCL 460.568(5). It is impossible to contend that these procedures are not "precise."

As noted by the court in *Attorney General, supra*, the existence of an extensive scheme

for review in the application approval process supports a finding that the act in question *is* constitutional. Act 30's scheme, which is far more specific and grants far more protections than the scheme in *Attorney General, supra*, provides sufficient guidelines for the exercise of the Commission's authority.

Third, the Legislature has stated in three separate places within the Michigan Statutes that the construction of transmission lines, if approved by the MPSC, overrides local ordinances. First, MCL 125.3205 states that zoning ordinances are subject to Act 30. Second, Act 30 provides that a CPCN "shall take precedence over a conflicting local ordinance." Third, Section 3 of Act 30 provides that the Act "shall control in any conflict between this act and any other law of this state." These provisions taken together establish that the Legislature has not unconstitutionally delegated its legislative authority with regard to Commission preemption of local ordinances. Quite to the contrary, the Legislature has concluded that, assuming Act 30's requirement for the issuance of a Certificate have been met, the Certificate *does* have priority over the ordinance. Though the MPSC may consider the ordinance as part of its public benefits analysis, once that analysis is done, the MPSC loses all discretion over the matter and the zoning ordinance is preempted insofar as it conflicts with a certificate.

In short, there simply is no basis under which Act 30 unconstitutionally delegates authority to the Commission. In fact, the Court of Appeals in this very action precisely summed up the reasons why Act 30 does not qualify as an unconstitutional delegation of legislative authority:

Act 30 is not an unconstitutional delegation of power. The evaluation of an application for a CPCN requires the PSC to consider a multitude of factors, including any conflicting local zoning ordinances. MCL 460.567(2)(d). Each application

presents its own unique facts and circumstances. The Legislature could not have specified with any practicality or feasibility what routes or configurations the PSC would be required to consider in each case. The standards set out in MCL 460.568(5) are as reasonably precise as the subject matter permits. See, e.g., *Kent Co Aeronautics Bd v Dep't of State Police*, 239 Mich App 563, 588; 609 NW2d 593 (2000). Moreover, the PSC can grant a CPCN only if it finds that the applicant has made the required showings set out in MCL 460.568(5). Neither Oshtemo Township nor amici Michigan Townships Association, et al, has established that Act 30 is an unconstitutional delegation of power from the Legislature to the PSC.

(Opinion, pp 11-12.) The Township's arguments, therefore, do not withstand legal scrutiny, and must be rejected. As the arguments plainly fail, so too should the application for leave to appeal.

V. THE COURT OF APPEALS AND THE COMMISSION DID NOT IGNORE ACT 30'S STATUTORY DEFINITIONS.

Finally, the Township asks this Court to grant leave to appeal to consider whether the Court of Appeals and the MPSC clearly erred by allegedly overlooking the definitions of "Route" and "Construction" under Section 2 of Act 30. According to the Township, had the Court of Appeals and the MPSC analyzed these terms as they apply to section 10 of Act 30, the Court of Appeals and the MPSC would have concluded that there was not a conflict between the Ordinance and the Certificate.

This argument fails on the merits because the Ordinance prohibits and regulates the "location" and "Construction" of the Weeds Lake Project, and as a result, conflicts with the Certificate. Under these circumstances, MCL 460.570 dictates that the Certificate controls. Plaintiff's argument turns on the specific language of MCL 460.570, which provides: "If the commission grants a certificate under this act, that certificate shall take precedence over a conflicting local ordinance . . . that prohibits or regulates

the **location** or construction of a transmission line for which the commission has issued a certificate.” MCL 460.570 (emphasis added). Under Act 30, “‘Construction’ means any substantial action on a route constituting placement or erection of the foundations or structures supporting a transmission line” and “‘Route’ means real property on or across which a transmission line is constructed or proposed to be constructed.” MCL 460.562. The Act does not define “location.”

The Township first contends that because the Ordinance does not regulate the “Route” of the transmission line, MCL 460.570 does not take precedence over the Ordinance. The Township’s argument ignores the obvious—MCL 460.570 does not use the term “Route.” Rather, the Legislature opted for “location”—a “certificate shall take precedence over a conflicting local ordinance . . . that prohibits or regulates the **location** or construction of a transmission line for which the commission has issued a certificate.” MCL 460.570 (emphasis added). The Township attempts to equate “Route” with location (without any analysis on the issue), and thereby contends that the Ordinance does not conflict with the Act. To do so, however, the Township must ignore one of the most basic principles of statutory interpretation.

“Simply put, ‘the use of different terms within similar statutes generally implies that different meanings were intended.’ *United States Fid Ins & Guar Co v Mich Catastrophic Claims Ass’n*, 484 Mich 1, 14; 795 NW2d 101 (Mich. 2009) (2A Singer & Singer, Sutherland Statutory Construction, (7th ed), § 46:6, p 252). “Route” and location are different terms. If the Legislature had intended the same meaning in both statutory provisions, it would have used the same word. *Id.* Thus, the Legislature intended different meanings be attached to them.

When the Legislature has not defined a statute's term, the Court may consider dictionary definitions to aid its interpretation. *Oakland County Bd of County Rd Comm'rs v Mich Prop & Cas Guaranty Ass'n*, 456 Mich 590, 604; 575 NW2d 751 (1998). Location means "[t]he specific place or position of a person or thing." Black's Law Dictionary 1024 (9th Ed. 2009). Thus, the "location" of a powerline entails more than just the "real property on or across which a transmission line is constructed or proposed to be constructed." Instead, "location" means the position of a thing, including whether the thing is above or below ground.

The Ordinance – which attempts to prohibit and regulate the location of a transmission line by requiring the construction of transmission line below ground – conflicts with the Certificate, which states that the transmission line should be constructed above ground. In fact, even the Ordinance provides that it regulates the location of transmission lines:

The Township shall have the right and authority to determine the location of the [transmission line] within the public right-of-way, street, road, alley or public place including verification that the same complies with the Township zoning requirements and the obligation and responsibility, if any, incident to such location and installation imposed upon such utility.

(Exhibit A-9 (emphasis added)). As the Court of Appeals noted, "the ordinance required METC to locate the proposed line underground in any area in which the line would come within 250 feet of a public right-of-way." (Opinion, p 3). Because the Ordinance seeks to regulate and prohibit the location of powerlines in a manner that conflicts with the Ordinance, the Certificate takes precedence.

Even assuming the Ordinance did not conflict with the "location" of the Certificate's transmission line (which it does), the Ordinance attempts to regulate the

“Construction” of the Weeds Lake Project and conflicts with the Certificate as a result. The Township conclusory contends that whether a transmission line is constructed above or below ground does not involve “any substantial action taken on a route constituting placement or erection of the foundations or structures supporting a transmission line.” MCL 450.562.

The Township’s argument is entirely meritless. The ordinance itself dictates this result:

Commencing November 25, 2011, **all public or private utilities who seek to construct utility lines, wires and related equipment and facilities along, across, over, and/or adjacent to any public street in the Township shall be required to place all lines, wires and/or related facilities and equipment underground within the public road right-of-way and to a point within 250 feet either side of said public right-of-way.**

(Exhibit A-9 (emphasis added)). Thus, the Ordinance seeks to regulate the construction of utility lines (and prohibit the construction of certain above-ground power lines) by requiring the construction to occur underground under specified circumstances.

The Certificate directs that above ground support structures should be constructed for the Weed Lake Project, but the ordinance prohibits the construction of above-ground support structures within 250 feet either side of a public right-of-way. Thereby, the Ordinance directly conflicts with the Certificate that calls for the erection of above-ground transmission lines and support structures. The conflict could not be clearer, even when the definition of “Construction” is considered. The Township’s final argument therefore fails and the Township has failed to assert any basis for granting leave to appeal.

CONCLUSION

The Township's arguments are meritless. The Court of Appeal's affirmance of the MPSC does not create "manifest injustice." Act 30 is not unconstitutional, the Court of Appeals did not ignore Act 30's plain language, and the Court of Appeals clearly analyzed and considered the conflict between the Certificate and the Ordinance. The Opinion was consistent with long standing precedent, the plain language of the statutes at issue, and the Michigan Constitution. The Township has failed to demonstrate any reason for this Court to grant leave and reverse the Court of Appeals' Opinion. Consequently, this Court should deny the Township's Application for Leave.

Respectfully submitted,

DYKEMA GOSSETT PLLC

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By /s/Shawn M. Johnson

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